ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	MM Docket No. 92-195
	)	
Amendment of Section 73.202(b),	)	RM-7091
Table of Allotments,	)	RM-7146
FM Broadcast Stations.	)	RM-8123
(Beverly Hills, Chiefland, Holiday,	)	RM-8124
Micanopy, and Sarasota, Florida)	)	

TO: The Commission

CONSOLIDATED REPLY OF DICKERSON BROADCASTING, INC.
TO OPPOSITIONS TO APPLICATION FOR REVIEW

1. Dickerson Broadcasting, Inc. ("Dickerson") hereby submits its Consolidated Reply to the Oppositions filed with respect to Dickerson's Application for Review in the above-captioned proceeding. Those Oppositions were filed (1) by Pasco Pinellas Broadcasting Company ("Pasco") [1/] on January 31, 1994, and (2) jointly by Sarasota-FM, Inc. ("Sarasota-FM"), Gator Broadcasting Corporation ("Gator") and Heart of Citrus, Inc. ("Heart") (referred to collectively herein as the "Joint Opposers") on February 4, 1994. As set forth below, neither the Pasco Opposition nor the Joint Opposition adequately or convincingly addresses the obvious flaws in the decisions below, flaws which are specifically raised in Dickerson's Application for Review.

2. Let's start with the arguments which both Pasco and the Joint Opposers advance. First, both dutifully reiterate the claim (also made in the Bureau's decisions below) that the actions below really were in compliance with the notice provisions of the Administrative Procedure Act ("APA"). The gist of this argument is that the APA does not require specific notice of specific

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[1/] Dickerson understands that Pasco is in fact a predecessor licensee of Station WLVU, Holiday, Florida, and that the current licensee of that station is Times Publishing Company. Since the Opposition was filed in the name of Pasco, however, Dickerson will use that name herein.

channels which are proposed to be allotted by the Commission. Both Pasco and the Joint Opposers dutifully cite the same general precedent which the Bureau itself relied, including, *e.g.*, *Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990), *Medford and Grants Pass, Oregon*, 45 R.R.2d 359 (Broadcast Bureau 1979) and *Owensboro on the Air v. U.S.*, 262 F.2d 702 (D.C. Cir. 1958).

3. The trouble with both Oppositions on this score is that they do no more than repeat what the Bureau has already said, as if by dint of repetition that argument might gain some shred of validity (or at least credibility). But Dickerson's Application for Review acknowledged the argument, and then demonstrated the plain flaw therein. That is, as the Court of Appeals has clearly stated, the purpose of the APA notice requirement is to assure that

> persons are 'sufficiently alerted to likely alternatives' so that they know whether their interests are 'at stake'."

National Black Media Coalition v. FCC, 791 F.2d 1016, 1023 (2d Cir. 1986).

4. As Dickerson pointed out in its Application for Review, there was absolutely no way that Dickerson could have guessed that its interests might be "at stake" on the basis of the Commission's notices concerning this proceeding. The Notice of Proposed Rule Making ("NPRM") involved a community some distance from Dickerson's community of license, and it involved a channel completely unrelated to Dickerson's. From the NPRM there was no indication that Dickerson's interests might be "at stake". Dickerson pointed this out in its Application for Review. Neither Pasco nor the Joint Opposers effectively refutes Dickerson's position.

5. Similarly, contrary to an argument advanced by the Joint Opposers (but not Pasco), the public notice concerning the Sarasota-FM/Gator counterproposal did not satisfy APA requirements, either. That public notice was not published in the Federal Register, did not reflect that the counterproposal was to be deemed a proposal of the Commission, and did not contain ***any*** indication that that counterproposal, filed more than three years after the effective date of the

currently operative channel separation rules, might not be deemed subject to those rules.

6. Thus, even if the lack of Federal Register publication is overlooked, and even if the public notice might have been deemed some kind of formal Commission "proposal" (even though the public notice did not on its face purport to be present such a proposal), Dickerson would have had to have had an extraorinarily accurate crystal ball to guess the ultimate outcome reached by the Bureau. Under these circumstances, it cannot be said (at least with a straight face) that Dickerson knew or could have known that its interests were "at stake".

7. With respect to the Bureau's decision to apply out-dated mileage separation standards to a counterproposal filed more than three years after those standards were written out of the rules, both Pasco and the Joint Opposers again dutifully parrot the Bureau's self-serving claims that that approach was appropriate. But, again, neither Pasco nor the Joint Opposers prove their claim -- rather, they are forced (as is the Bureau) to rely on contorted and distorted misreadings of the rules, the Report and Order underlying the rules, and the Bureau's own decisions below herein.

8. Pasco, for example, claims that the Bureau's action allotting Channel 292C3 to Beverly Hills must be construed as a "grant" of Heart's original petition for rule making. Pasco Opposition at 8. But Heart's original petition -- the only petition in this proceeding which was filed prior to the effective date of the rules, *i.e.*, October 2, 1989 -- did ***NOT*** propose the use of Channel 292C3 to Beverly Hills. Rather, Heart proposed the allotment of Channel 246C3 there. It cannot accurately be said, then, that the Bureau's action below constituted a "grant" of Heart's original petition. [2/]

9. Pasco also adopts an approach similar to one adopted by the Joint Opposers on this point. Both Oppositions assert that the Commission's *Second Report and Order* in *Amendment of*

[2/] Of course, as Dickerson pointed out in its Application for Review, one plain demonstration of the correctness of Dickerson's position is that the Bureau's actions below do not contain any "ordering" clause specifically "granting" Heart's original petition. Needless to say, neither Pasco nor the Joint Opposers suggest otherwise.

Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations) ("*Mileage Separation Order*"), 4 FCC Rcd 6375 (1989), contemplated the application of the "old" rules (*i.e.*, the rules which were being abandoned as of October 2, 1989, pursuant to the *Mileage Separation Order*) to virtually ***any*** proposal, as long as it somehow involved a proceeding initiated prior to October 2, 1989.

10. But the Commission's actual language was as follows:

> Applications and petitions filed prior to October 2, 1989 must comply with, and will be processed in accordance with, the current rules.

Mileage Separation Order, 4 FCC Rcd at 6382, ¶57. Pasco seems to read this as saying that "petitions filed prior to October 2, 1989 and any counterproposals filed in response to such petitions, no matter when" -- a fanciful and self-serving reading if ever there was one. Pasco, of course, offers absolutely no support for its reading.

11. For their part the Joint Opposers similarly offer no support for their nearly identical -- and equally fanciful and self-serving -- reading of the above-quoted language. Instead, the Joint Opposers claim that "common sense and basic fairness dictate" their reading. Joint Opposition at 14. Frankly, the Joint Opposers are wrong on both counts.

12. As far as "common sense" is concerned, it would make absolutely no sense for the Commission to change its rules as of a date certain, and yet leave a gaping loophole effectively eviscerating the imposition of that effective date. That is, by clearly shifting to new rules as of October 2, 1989, the Commission plainly wanted to commence, as of that date, the utilization of its new rules. Since some specific proposals were already in the pipeline at that time, the Commission acknowledged that those specific proposals (*i.e.*, "applications and petitions filed prior to October 2, 1989") would be considered pursuant to the old rules. But the Commission was obviously attempting to restrict any further applicability of the old rules to those old proposals, and to put everyone on

notice that proposals advanced ***after*** October 2, 1989 would be subject to the new rules. In that way, any lingering applicability of the old, discarded rules would be severely limited.

13. But the Joint Opposers' reading of the *Mileage Separation Order* would completely undermine the Commission's goal of prompt implementation of the new rules (and equally prompt mothballing of the old rules, except in very limited cases). The instant case is a perfect example. The proposal which the Joint Opposers would have the Commission adopt was advanced ***NOT*** prior to October 2, 1989, but rather in October, 1992 -- more than three years later. How can it be "common sense" for the Commission to announce the abandonment of certain rules as of October 2, 1989 if the Commission really intended that the supposedly abandoned rules might be applied to proposals filed three years later?

14. Similarly, the Joint Opposers' claim of "basic fairness" has an extraordinarily self-serving ring to it, particularly in light of the fact that application of rules which have been gone for three years would adversely affect Dickerson, which was given no notice of what was going to happen here. Sure, the Joint Opposers would like to think their approach is "fair" -- but that's most likely because their approach was designed by them to work to their advantage.

15. Thus, the arguments which are common to both of the Oppositions have no solid support anywhere (other than the wishful thinking of Pasco and the Joint Opposers).

16. The two Oppositions do diverge in certain respects. For its part, Pasco asserts that Dickerson's "substantive arguments" were themselves "unavailing". Pasco Opposition at 9-10. The trouble with this approach is that Dickerson was never really given a full opportunity to make any "substantive arguments", since the allotment decision had already been made, and the Report and Order below issued, before Dickerson learned of the situation. While Dickerson did file a *pro se* petition for reconsideration of the Report and Order, the die had already been cast by then, and it cannot be said that any showing would have been adequate in the post-decision eyes of the Bureau.

The Bureau's disposition of Dickerson's *pro se* petition for reconsideration reflects this: a mere one-sentence footnote (footnote 3) was all the attention the Bureau was inclined to give to its myopic view of the practical aspects of the decision. [3/]

17. The Joint Opposition includes a variation on Pasco's argument. At pages 7-9 the Joint Opposers assert that Dickerson had "actual notice" of the Beverly Hills proposal as a result of the issuance of the Report and Order. This argument is advanced apparently in response to Dickerson's claim that Dickerson did not receive the notice required by the APA concerning the possible allotment of Channel 292C3 to Beverly Hills. But the APA does not provide for "actual notice in the shape of a done-deal Report and Order"; rather, the APA requires a notice by the agency concerning proposals which the agency itself is advancing. Thus, the ultimate issuance of the Bureau's Report and Order cannot be said to have provided notice as required by the APA. And even if the Report and Order provided some notice, the Bureau's back-of-the-hand treatment of Dickerson's *pro se* petition for reconsideration suggests that such notice was, at most, a pesky and inconvenient by-product of the decision as far as the Bureau was concerned.

18. In a novel argument, the Joint Opposers assert that Dickerson can be ignored herein because it does not have a "proposal suitable for Commission consideration." Joint Opposition at 15-17. The thrust of this argument appears to be that Dickerson is just a frustrated counterproponent whose counterproposal was unacceptable in a rule making context. But that inaccurate and somewhat misleading characterization misses the point. As a Class A FM licensee,

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[3/] For the record, Dickerson notes that the Bureau's sole reference to the "substantive arguments" here -- *i.e.*, Footnote 3 of the Memorandum Opinion and Order on reconsideration -- is somewhat lacking. There the Bureau chose to compare (a) the increase in service likely from a power increase for Dickerson (from three to six kilowatts) and (b) the service increase likely from a Class C3 upgrade in Beverly Hills. The trouble is that the Beverly Hills proposal is blocking not just Dickerson, but also (as a result of the blockage of Dickerson), three other Class A stations from increasing from three to six kilowatts. Thus, the proper comparison from a service increase perspective would be the aggregate of those four stations with improved facilities as against the Beverly Hills upgrade. Dickerson submits that such a comparison would weigh substantially in favor of Dickerson.

Dickerson is entitled to the protection of the mileage separation standards set out in the rules. Thus, Dickerson does not have to file ***any*** proposal in order to enjoy the protection of the rules. It is disingenuous for the Joint Opposers to attempt to recast Dickerson's role here as, in effect, a counterproponent.

19. The Joint Opposers advance the equally bogus claim that the allotment of Channel 292C3 to Beverly Hills did not modify Dickerson's license. Joint Opposition at 17-18. This claim is based on the Joint Opposers' incorrect belief that the standards adopted in the *Mileage Separation Order* -- standards which have been in effect since October 2, 1989 -- do not apply here because this case arose from a petition for rule making filed prior to the effective date of those standards. But, as Dickerson has demonstrated in its Application for Review and above, that self-serving claim is without foundation.

20. Perhaps recognizing the futility of hanging their hats on the Heart petition for rule making (which, after all, did not mention a thing about Channel 292C3 in Beverly Hills), the Joint Opposers also try to rely on the fact that Sarasota-FM and Gator had themselves attempted, prior to October 2, 1989, to secure, *inter alia*, the allotment of Channel 292A to Beverly Hills. But those efforts had been unavailing: separate proposals filed by Sarasota-FM and Gator were rejected by the Bureau in MM Docket No. 87-455, *see Perry, Florida*, 7 FCC Rcd 2557 (Policy and Rules Division 1992). [4/] And the proposal which was supposedly mutually exclusive with the Beverly Hills proposal from which the instant proceeding arose has never been the subject of any favorable

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[4/] At Footnote 2 to the Joint Opposition, the Joint Opposers suggest that they were invited by the Bureau's staff to file their counterproposal in the instant proceeding. As it turns out, though, that's not quite accurate. In the *Perry, Florida* proceeding, a proposal by Gator which generally ressembled the proposal advanced in the instant proceeding by Gator and Sarasota-FM was flatly rejected for a number of procedural reasons. In dismissing the proposal, the Bureau noted that that dismissal "does not preclude Gator from submitting a new Petition for Rule Making after the conclusion of this proceeding." 7 FCC Rcd at 2558. This, presumably, is the "invit[ation]" to which the Joint Opposers refer at Footnote 2. But this is hardly an "invitation" to file a late counterproposal, nor is it a promise to consider any petition for rule making which might have been filed in response to the "invitation".

consideration; rather, it was dismissed as moot in the Report and Order below. [5/] Since their efforts were unequivocally unsuccessful, it is difficult to perceive how the Joint Opposers could conclude that those efforts could conceivably undercut Dickerson's arguments in any way.

21. Finally, Dickerson is again constrained to alert the Commission and the other parties hereto that it is pursuing a possible amicable resolution of this matter. Dickerson will report to the Commission and the other parties on this possibility as developments warrant.

Respectfully submitted,

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[5/] In a footnote the Joint Opposers suggest that that petition for rule making may somehow stil be alive and kicking. *See* Joint Opposition at n.5. But the Joint Opposers have never, to the best of Dickerson's knowledge, sought any kind of reconsideration or review of the dismissal of their petition. Having failed to preserve their rights in an appropriate manner, the Joint Opposers appear to have waived the opportunity to do so, and that aspect of the Report and Order appears to be final. *See, e.g., Northwestern Indiana Telephone Co., Inc. v. FCC*, 872 F.2d 465 (D.C. Cir. 1989); *Susan S. Mulkey*, 4 FCC Rcd 5520 (1989).

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that on this 28th day of February, 1994, I caused copies of the foregoing "Consolidated Reply of Dickerson Broadcasting, Inc. to Oppositions to Application for Review" to be placed in the U.S. Postal Service, first class postage prepaid, or hand delivered (as indicated below), addressed to the following persons:

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